
IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 706

CITY OF CHICAGO, a Municipal Corporation, BOARD
OF HEALTH OF THE CITY OF CHICAGO, DR.
ROBERT A. BLACK, Health Commissioner and Acting
President of the Board of Health of the City of
Chicago,

Petitioners,

FIELD CREST DAIRIES, INC.,

Respondent.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT, THERE HEARD ON APPEAL
FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DI-
VISION

MOTION TO STAY THE MANDATE AND TO MODIFY THE
JUDGMENT AS TO COSTS HEREIN AND REASONS IN
SUPPORT THEREOF

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ROBERT A. BLACK, Health Commissioner and Acting
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vs.

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THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DI-
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**MOTION TO STAY THE MANDATE AND TO MODIFY THE
JUDGMENT AS TO COSTS HEREIN AND REASONS IN
SUPPORT THEREOF.**

MAY IT PLEASE THE COURT:

Motion to Stay Mandate.

1. Comes now Fieldcrest Dairies, Inc., respondent here-
in, by its attorneys, and moves the Court or some justice
thereof when the Court is not in session to stay the issu-

ance of the mandate pending the disposition of the accompanying motion of the respondent to modify with respect to the payment of costs the judgment entered herein on April 27, 1942, the text of which judgment is set forth in the appendix hereto.

Motion to Modify Judgment.

2. Comes now Fieldcrest Dairies, Inc., respondent, within the time allowed by Rule 33 for the filing of a petition for rehearing and moves the Court to modify the judgment entered herein on April 27, 1942, by eliminating from said judgment that portion thereof providing that the vacation of the decree of the trial court is at the cost of the respondent.

Reasons in Support of Motions.

3. In support of the above motions the respondent respectfully represents the following facts:

4. Unless stayed, the mandate will issue on May 22, 1942, twenty-five days after the entry of the judgment (Rule 34). The time for filing of a petition for rehearing also expires May 22, 1942, (Rule 33) and the filing of such a petition does not stay the issuance of the mandate unless the time is enlarged by order of the Court or of a justice thereof when the Court is not in session (Rule 34).

5. The opinion in the case did not indicate what the judgment to be entered herein would provide with respect to costs, and Rule 32 makes no express provision as to costs in the event of the "vacating" of a decree of a lower court, so that it was necessary to obtain a copy of

the judgment before counsel could determine as a certainty what the judgment provided with respect to costs. It was not reasonably possible to prepare, have printed, and serve a motion to modify the judgment between the time that counsel received the copy of the judgment (even though seasonably requested by them of the Clerk and promptly furnished by him) and the date—May 11, 1942,—when the Court adjourned until May 25, 1942. Consequently, respondent respectfully asks that the issuance of the mandate be stayed until the Court on May 25, 1942, or thereafter, disposes of the motion to modify the judgment.

6. On the merits of the motion to modify the judgment by eliminating therefrom the provision that the petitioners recover costs from the respondent, we respectfully call the Court's attention to the fact that the petitioners resisted the trial of the similar case in the state court. The respondent's parent corporation, Dean Milk Company, commenced an action in the Circuit Court of Cook County, Illinois, on May 15, 1940, following the passage of the Illinois Milk Pasteurization Plant Act of 1939, which this Court holds in its opinion should first be construed by the state court before the instant case is decided by the United States District Court. (We refer the Court to the "Joint Statement of Counsel Concerning Case of *Dean Milk Company, an Illinois Corporation, v. City of Chicago, a Municipal Corporation, et al.*, in Circuit Court of Cook County, Illinois and Appellate Court of Illinois, First District" filed in this cause at the request of this Honorable Court, which for convenience, we shall designate as the "Joint Statement").

7. The Dean Milk Company complaint in the state court referred to the 1939 statute (Joint Statement, p. 5)

and attached a copy of it as Exhibit "B" to the complaint (Joint Statement, p. 23).

8. In opposition to the issuance of an injunction in the state court proceeding and in denial of the existence of any emergency justifying injunctive relief, the petitioners (then the defendants), set forth at length the Federal court proceedings (Joint Statement, pp. 38-40).

9. The injunction having been entered by the state court (Joint Statement, pp. 44-46), petitioners appealed to the Illinois Appellate Court and in support of a motion to stay the operation of the trial court's injunction filed written suggestions under oath stating, among other things, that the trial court should not have entered the injunction because of the pendency of the proceedings in the United States District Court (Joint Statement, p. 49).

10. Upon reversal pursuant to confession of error, the petitioners also moved the Appellate Court to direct the trial court to stay proceedings until the determination of the Federal court case (Joint Statement, p. 50) and filed written suggestions in support thereof urging that the pendency of the Federal court case, etc., "should now persuade this honorable court, on this chancery appeal, to stay proceedings in this cause until the litigation in the Federal court can be determined". (Joint Statement, p. 51). This motion was denied (Joint Statement, p. 54).

11. Upon remandment of the state court case to the trial court, the petitioners on June 25, 1940, filed a motion and petition that the trial court stay proceedings in that case pending the disposition of the case in the Federal court (Joint Statement, pp. 54-57).

12. Thereafter, the decree of the Federal district court was entered and an appeal was taken by petitioners to the Circuit Court of Appeals. At no time did petitioners

move, suggest or intimate before the Master or before the District Court that the Federal court should withhold action pending decision of any question by the state court. Nor did the petitioners seek to test the validity or construction of its ordinance in the state courts by proceeding against other dairies selling milk in paper bottles not protected by the District Court's injunction. This was conceded by the City's counsel during the oral argument before this Honorable Court on March 31, 1942, in response to a question by Mr. Justice Black.

13. On March 3, 1941, this Court filed its opinion in *Railroad Commission of Texas v. The Pullman Company*, 312 U. S. 496. The appeal in this case was then pending undetermined in the Circuit Court of Appeals. The petitioners did not suggest in any brief filed in that Court, nor upon the oral argument which took place there in May, 1941, nor by petition for rehearing following an adverse decision rendered August 4, 1941, that the Federal court should in the exercise of discretion, or otherwise, stay its hand pending a decision of any question by the state court.

14. Upon the oral argument in this Honorable Court, the petitioners expressly asked the Court to decide on their merits the issues here presented.

15. The decision of the case which the Court made was, therefore, one not requested by any litigant but is based upon the broad grounds of policy enunciated in the opinion of the Court. Under this circumstance, we most respectfully suggest that the costs ought not to be taxed against the respondent, and that the judgment order should be modified (as permitted by Rule 32) by providing that neither party should recover costs against the other, or, in the alternative, by providing such other determination as to costs as to the Court shall seem meet,

16. Owing to the length of the record, the costs in the case are substantial and if taxed against the respondent will constitute a very heavy burden upon it. Because the decision of this case was not in favor of either party upon the merits, and because the incurring of costs was as much due to the unsuccessful desire of the petitioners to have the case determined by the Federal courts as it was due to the fact that respondent continued to prosecute this suit (then already pending) after the 1939 statute was enacted, respondent respectfully urges the Court to allow the relief here sought.

FIELDCREST DAIRIES, INC.,
Respondent,
 By FRED A. GARIEPY,
 OWEN RALL,
 JOHN SPALDING,
Its Attorneys.

STATE OF ILLINOIS, }
 COUNTY OF COOK. } ss.

Owen Rall, being first duly sworn, on oath deposes and says that he is a member of the bar of the Supreme Court of the United States, is one of the attorneys for the respondent herein, and is authorized to file this affidavit; further, that the above motion is subscribed in behalf of the respondent by its attorneys above mentioned by the authority of said respondent; and that the statements contained in said motion are true to the best of the knowledge and belief of this affiant.

(S) OWEN RALL.

Subscribed and sworn to before me this 19th day of May,
 A. D. 1942.

(S) EDNA M. RADOLL.

Appendix—Form of Judgment Entered

April 27, 1942.

SUPREME COURT OF THE UNITED STATES.

No. 706 —, October Term, 1941.

CITY OF CHICAGO, a Municipal Corporation, Board of
Health of the City of Chicago, *et al.*,

Petitioners,

v.

FIELDCREST DAIRIES, INC.

On writ of certiorari to the United States Circuit
Court of Appeals for the Seventh Circuit.

This cause came on to be heard on the transcript of the
record from the United States Circuit Court of Appeals
for the Seventh Circuit, and was argued by counsel.

On consideration whereof, It is now here ordered and
adjudged by this Court that the judgment of the said
United States Circuit Court of Appeals, in this cause, be,
and the same is hereby, vacated with costs; and that this
cause be, and the same is hereby, remanded to the Dis-
trict Court of the United States for the Northern District
of Illinois with directions to retain the bill pending a
determination of proceedings in the state court in con-
formity with the opinion of this Court.

(Signed) WM. O. DOUGLAS.

April 27, 1942.

MR. JUSTICE ROBERTS concurs in the result.